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Wei Hong Ping v Public Prosecutor

B COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-05–165–04 OF 2021
HADHARIAH SYED ISMAIL, SEE MEE CHUN AND HASHIM HAMZAH JJCA
3 OCTOBER 2022

C

Criminal Procedure — Appeal — Appeal against conviction and sentence — Appellant charged for offence of drug trafficking under s 39B(1)(a) of Dangerous Drugs Act 1952 — Appellant convicted and sentenced to death — Whether there was failure to appreciate defence of appellant — Dangerous D *Drugs Act 1952 s 39B(1)(a) & 39B(2A)*

On 13 November 2014 at around 1.30am, PW2 and his team were on duty monitoring the KLIA 2 international arrival hall. He saw the appellant ('accused') with a handbag walking towards the door and pulling a brown bag E ('the bag'). The accused appeared suspicious and was looking left and right while stopping to look around. The bag was scanned at the customs scanning machine where no suspicious image was detected. The accused appeared agitated and was then ordered to the narcotics office at KLIA. PW2 opened the bag witnessed by police personnel and the accused. Women's clothes, a few pair F of shoes and an orange plastic bag containing women's underwear were found. He lifted the bottom cover of the bag and it was zipped. It was then opened and under the cover was another cover with a black plastic containing crystal coloured substances suspected to be drugs. This was shown to the accused and it was explained to her in simple English what was found. The accused did not G say anything and appeared panicky. The accused were arrested and the seized items were brought to the Selangor IPD and handed over to the investigating officer ('PW4'). The crystalline substance found in the bag carried by the accused was confirmed to be 1,457.8g of methamphetamine. The accused was charged for the offence of drug trafficking under s 39B(1)(a) of the Dangerous H Drugs Act 1952 ('the DDA'). The High Court judge ('HCJ') found that there had been no failure to investigate a person named Yaya as referred to in the cautioned statement which had prejudiced the accused. The HCJ considered there had been no complete details of Yaya, who was said to be the owner of the drugs, for the police to investigate. The HCJ found the prosecution had made I out a prima facie case against the accused and the accused was called to enter upon her defence. The accused had failed to raise any reasonable doubt on the prosecution case and the HCJ found the prosecution had proved its case beyond reasonable doubt. The accused was convicted and sentenced to death. Hence, this appeal by the accused against the conviction and sentence.

Held, affirming the conviction and substituting the sentence with life imprisonment:

(1) The information on Yaya not only went to the reasonableness of the accused narration of Yaya but it was also not sufficient for the police to investigate and determine the existence of Yaya. The evidence showed the accused to have possession of the bag where the drugs were found and PW4's evidence that there was no foreign DNA on the clothes seized. The defence of innocent carrier had also to be examined in the light of the doctrine of wilful blindness. The turning of a blind eye was in relation to the delivery of the bag which consisted of inexpensive samples of clothes and shoes, but the accused was to be paid a lucrative sum. There was no reason to depart from the finding of the HCJ. The most telling was that the clothes and shoes to be brought over to Malaysia were, as even admitted by the accused, not expensive and it was more reasonable these samples be introduced online. Reference was also made to the drugs being hidden in the bag such that the accused could not have known of the drugs. This was put paid by the HCJ that if that were so, liability would be escaped by merely ensuring that the drugs were hidden. The HCJ did not err in finding that Yaya was a fictitious person. The HCJ had also considered all aspects of the defence of innocent carrier, wilful blindness and whether it could be said the accused had no knowledge of the drugs in the bag. The conviction was safe (see paras 27, 31, 33, 36 & 38–40).

(2) In light of s 39B(2A) of the DDA, the mandatory death sentence was no longer the only sentence available to the court. The court had a discretion to impose a sentence of life imprisonment. The HCJ only stated that the accused's case did not fall under s 39B(2A) of the DDA. In the circumstances of the case, the court exercised its discretion given under s 39B(2A) DDA (see paras 43–44).

[Bahasa Malaysia summary

Pada 13 November 2014 lebih kurang jam 1.30 pagi, PW2 dan pasukannya telah menjalankan tugas memantau balai ketibaan antarabangsa KLIA 2. Dia melihat perayu ('tertuduh') dengan beg tangan berjalan ke arah pintu dan menarik beg coklat ('beg'). Tertuduh kelihatan mencurigakan dan memandang ke kiri dan ke kanan sambil berhenti melihat sekeliling. Beg itu telah diimbas di mesin pengimbas kastam di mana tiada imej yang mencurigakan dikesan. Tertuduh kelihatan gelisah dan kemudian diarahkan ke pejabat narkotik di KLIA. PW2 membuka beg itu dengan disaksikan anggota polis dan tertuduh. Pakaian wanita, beberapa pasang kasut dan beg plastik berwarna jingga berisi seluar dalam wanita ditemui. Dia mengangkat penutup bawah beg itu dan ianya berzip. Ia kemudian dibuka dan di bawah penutupnya terdapat satu lagi penutup dengan plastik hitam mengandungi bahan berwarna kristal disyaki dadah. Ini telah ditunjukkan kepada tertuduh dan ia telah dijelaskan

kepadanya dalam bahasa Inggeris mudah apa yang ditemui. Tertuduh tidak berkata apa-apa dan kelihatan cemas. Tertuduh telah ditahan dan barang rampasan dibawa ke IPD Selangor dan diserahkan kepada pegawai penyiasat ('PW4'). Bahan kristal yang ditemui dalam beg yang dibawa tertuduh itu disahkan sebagai 1,457.8g methamphetamine. Tertuduh didakwa atas kesalahan mengedar dadah di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'). Hakim Mahkamah Tinggi ('HMT') mendapati bahawa tidak ada kegagalan untuk menyiasat seseorang bernama Yaya seperti yang dirujuk dalam kenyataan beramaran yang telah memprejudiskan tertuduh. HMT berpendapat tiada butiran lengkap Yaya, yang dikatakan pemilik dadah itu, untuk disiasat polis. HMT mendapati pihak pendakwaan telah membuktikan kes prima facie terhadap tertuduh dan tertuduh dipanggil untuk membela diri. Tertuduh telah gagal menimbulkan sebarang keraguan munasabah terhadap kes pendakwaan dan HCJ mendapati pihak pendakwaan telah membuktikan kesnya di luar keraguan munasabah. Tertuduh telah disabitkan kesalahan dan dijatuhkan hukuman mati. Oleh itu, rayuan ini oleh tertuduh terhadap sabitan dan hukuman.

Diputuskan, mengesahkan sabitan dan menggantikan hukuman dengan penjara seumur hidup:

(1) Maklumat mengenai Yaya bukan sahaja kepada kewajaran penceritaan tertuduh terhadap Yaya tetapi juga tidak mencukupi untuk polis menyiasat dan menentukan kewujudan Yaya. Keterangan menunjukkan tertuduh mempunyai milikan beg di mana dadah ditemui dan keterangan PW4 bahawa tiada DNA asing pada pakaian yang dirampas. Pembelaan pembawa yang tidak bersalah juga perlu diperiksa berdasarkan doktrin *wilful blindness*. Tindakan menutup mata adalah berhubung penghantaran beg yang mengandungi sampel pakaian dan kasut yang murah, tetapi tertuduh dibayar dengan jumlah yang lumayan. Tidak ada sebab untuk menyimpang daripada penemuan HMT. Yang paling menarik adalah pakaian dan kasut yang akan dibawa ke Malaysia, seperti yang diakui tertuduh, tidak mahal dan lebih munasabah sampel ini diperkenalkan secara dalam talian. Rujukan juga dibuat kepada dadah yang disembunyikan di dalam beg itu supaya tertuduh tidak mengetahui dadah itu. Ini telah ditolak oleh HMT bahawa jika begitu, liabiliti akan terlepas dengan hanya memastikan dadah itu disembunyikan. HMT tidak terkhilaf apabila mendapati Yaya adalah seorang rekaan. HMT juga telah mempertimbangkan semua aspek pembelaan pembawa yang tidak bersalah, *wilful blindness* dan sama ada boleh dikatakan tertuduh tidak mempunyai pengetahuan tentang dadah di dalam beg itu. Sabitan adalah selamat (lihat perenggan 27, 31, 33, 36 & 38–40).

(2) Berdasarkan s 39B(2A) ADB, hukuman mati mandatori bukan lagi satu-satunya hukuman yang ada terhadap mahkamah. Mahkamah mempunyai budi bicara untuk menjatuhkan hukuman penjara seumur

hidup. HMT hanya menyatakan bahawa kes tertuduh tidak termasuk di bawah s 39B(2A) ADB. Dalam keadaan kes tersebut, mahkamah menggunakan budi bicaranya yang diberikan di bawah s 39B(2A) ADB (lihat perenggan 43–44).]

Cases referred to

Alcontara a/l Ambross Anthony v PP [1996] 1 MLJ 209, FC (refd)
Ali Hosseinzadeh Bashir v PP [2015] MLJU 2069; [2015] 1 CLJ 918, CA (refd)
Maria Elvira Pinto Exposto v PP [2020] 3 MLJ 21; [2020] 5 CLJ 1, FC (refd)
Munuswamy Sundar Raj v PP [2015] 6 MLJ 214, FC (refd)
Taja bin Tarji & Herman v PP (05[M]-98–09 of 2020(J)) (unreported), FC (refd)
Teh Hock Leong v PP [2008] MLJU 284; [2008] 4 CLJ 764, CA (refd)
Tiang Shi Chye v PP [2020] 1 LNS 506, HC (refd)
Tobechi Chinonso Madu v PP [2015] MLJU 2038, CA (refd)
Yee Wen Chin v PP [2008] 6 MLJ 222; [2008] 6 CLJ 773, CA (refd)
Zulfikar bin Mustaffah v PP [2001] 1 SLR 633, CA (refd)

Legislation referred to

Dangerous Drugs Act 1952 s 39B(2A)

Appeal from: *Pendakwa Raya lwn Wei Hong Ping* [2021] MLJU 2803 (High Court, Shah Alam)

Gooi Soon Seng (with Choong Kak Sen) (Gooi & Azura) for the appellant.
Atiqah bt Abdul Karim (Deputy Public Prosecutor, Attorney General's Chambers) for the prosecution.

See Mee Chun JCA:

INTRODUCTION

[1] The accused/appellant was charged as follows:

> Bahawa kamu pada 13.11.2014 lebih kurang 1.30 pagi di Balai Ketibaan Antarabangsa, KLIA 2 Sepang, Dalam Daerah Sepang, Di dalam Negeri Selangor Darul Ehsan, didapati mengedar dadah berbahaya jenis methamphetamine seberat 1457.8 gram. Oleh yang demikian itu, kamu telah melakukan kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta Dadah Berbahaya 1952.

At the conclusion of trial, the accused was convicted and sentenced to death by the High Court.

[2] The accused appealed against the conviction and sentence. We dismissed

A the appeal on conviction but allowed that on sentence where we set aside the death sentence and substituted it with life imprisonment. We now give our reasons.

PROSECUTION CASE

B

[3] On 13 November 2014 at around 1.30am, Sergeant Mohd Ghazali bin Idris (PW2) and his team were on duty monitoring the KLIA 2 international arrival hall at the area between the carousel and customs inspection. He saw the accused with a handbag walking towards the door, and pulling a brown bag C ('the bag'/P12). The accused appeared suspicious and was looking left and right while stopping to look around.

[4] PW2 approached the accused, introduced himself as a policeman and D asked for her passport. The particulars revealed her as Wei Hong Ping, a Chinese national. The luggage tag on the bag indicated the accused travelled from Hong Kong to Kuala Lumpur on flight AK131.

[5] The bag was scanned at the customs scanning machine where no E suspicious image was detected. The accused appeared agitated and was then ordered to the Narcotics Office at KLIA. A female Lance Corporal did a physical examination on the accused and found nothing.

[6] PW2 then opened the bag witnessed by police personnel and the F accused. Women's clothes, a few pair of shoes and an orange plastic bag containing women's underwear were found. When the items were removed, PW2 lifted the bag and found it heavy. He then lifted the bottom cover of the bag and it was zipped. It was then opened and under the cover was another G cover with a black plastic (P19A) containing crystal coloured substances suspected to be drugs. This was shown to the accused and it was explained to her in simple English what was found. The accused did not say anything and appeared panicky. The handbag (P13) was inspected and there was a small flowery wallet. There was also a boarding pass in the name of the accused and H a Nokia and Samsung handphone. PW2 arrested the accused and all the items were seized. The accused and the seized items were brought to the Selangor IPD and handed over to the Investigating Officer, Inspector Amri bin Mohd Arif (PW4).

I **[7]** The crystalline substance was sent to the chemist for analysis and confirmed to be 1,457.8g of methamphetamine.

FINDING AT THE CLOSE OF THE PROSECUTION CASE

[8] The High Court judge (HCJ) found that the crystalline substance found in the bag carried by the accused was confirmed by the chemist (PW3) to be 1,457.8g of methamphetamine. This was not challenged by the defence. Methamphetamine is a scheduled drug under the Dangerous Drugs Act 1952 ('the DDA').

[9] The HCJ found that the accused had ownership and control of the drugs as she was walking alone while pulling the bag and there was no one else with her. Some of the clothes in the bag fitted and matched the body of the accused. This was proved by way of 'ujipakai' done by PW4. The bag tag with the serial number 080717482 in the name of the accused with flight number AK131 matched that of the boarding pass and luggage claim found in the handbag.

[10] The manner and condition of the drugs found in the bag by modifying the space and concealing it, showed knowledge. The agitation and panic state of the accused showed knowledge too. *Teh Hock Leong v Public Prosecutor* [2008] MLJU 284; [2008] 4 CLJ 764 and *Ali Hosseinzadeh Bashir v Public Prosecutor* [2015] MLJU 2069; [2015] 1 CLJ 918 were cited for the proposition that the drugs being hidden from view does not mean the accused could not have known of the presence of the drugs.

[11] Trafficking had also been proved as the accused had arrived from Hong Kong and was exiting the arrival hall of KLIA 2 with the bag. This amounted to an act to distribute similar to *Munuswamy Sundar Raj v Public Prosecutor* [2015] 6 MLJ 214. The large quantity of drugs would carry the inference of trafficking as opposed to own use.

[12] There had been no failure to investigate a person named Yaya as referred to in the cautioned statement (D23) which had prejudiced the accused. The HCJ considered there had been no complete details of Yaya, who is said to be the owner of the drugs, for the police to investigate. It was not a sufficient notice under the *Alcontara* notice principle as per *Tiang Shi Chye v Public Prosecutor* [2020] 1 LNS 506. The same too for the failure to investigate the contents of the Samsung handphone.

[13] The HCJ found the prosecution had made out a prima facie case against the accused in respect of the charge. The accused was called to enter upon her defence.

THE DEFENCE OF THE ACCUSED

[14] The accused gave evidence under oath through her witness statement. She is from Guangdong, China and worked as a shop assistant in a picture making frame shop. Through social media, she came to know a black Nigerian man, by the name of Yaya. She then met him at a restaurant. There, Yaya offered her a job to bring clothes and shoes abroad for RMB2,000. The accused accepted the job and went to Indonesia at the end of 2013 with all expenses paid by Yaya. Upon her return from Indonesia she has met Yaya once in April 2014 and they communicate through social media.

[15] In October 2014, Yaya asked the accused to send clothes and shoes to Malaysia for which she would be paid RMB4,000. On 30 October 2014, the accused met Yaya and handed her passport for visa and other purposes. On 11 November 2014, Yaya informed the accused that his friend would come over on 12 November 2014 to hand the items, her passport and return flight ticket with 200 dollars cash.

[16] On 12 November 2014, the bag which is brown in colour, was handed over. The accused opened the bag to check and found clothes and shoes and she put her clothes inside. Yaya informed the accused that the clothes and shoes were samples to be sent to his friend in Malaysia. He gave her the phone number which the accused saved in the handphone.

[17] The accused departed for Malaysia where the events as narrated above leading to her arrest unfolded.

FINDING AT THE END OF TRIAL

[18] The HCJ found the denial of knowledge of the drugs found in the bag was a defence of innocent carrier which goes hand in hand with the doctrine of willful blindness. The HCJ examined the evidence and found it impossible that the accused did not have knowledge and that the explanation given was not reasonable. This was set forth in paras 42 and 43 of the grounds. The version of the accused was said to be very unreasonable and more of 'satu dongengan' (para 46).

[19] The HCJ did not believe that Yaya existed and the reasons were elaborated in paras 51 and 52. The information about Yaya which was given by the accused, did not meet the requirements of a notice as required by *Alcontara a/l Ambross Anthony v Public Prosecutor* [1996] 1 MLJ 209. In short, Yaya was but a fabrication of the accused.

[20] The HCJ did not believe that the handphone numbers of Yaya and his

friend had been kept in the Samsung handphone.

[21] There had been willful blindness where the accused turned a blind eye to the obvious. Refer to para 49 of the grounds.

[22] The accused had failed to raise any reasonable doubt on the prosecution case. The HCJ found the prosecution had proved its case beyond reasonable doubt. The accused was found guilty and convicted of the charge against her. As the case did not fall under s 39B(2A) of the DDA, the accused was sentenced to death.

THE APPEAL

[23] At the appeal, the accused raised the issue that there had been a failure to appreciate the defence that the accused did not have knowledge of the drugs and that she was an innocent carrier. Yaya was said to be a fictitious character where the HCJ's reasoning of the communication between Yaya and the accused was based on conjecture. The prosecution had failed to negate the existence of Yaya where there had been a failure to produce the Samsung handphone where the communication through WeChat can be found as well as Yaya's telephone number along with photographs of the both of them together.

OUR DECISION

[24] The thrust of the contention of the accused was that she was an innocent carrier being used by Yaya who is the actual trafficker. Reference to *Yee Wen Chin v Public Prosecutor* [2008] 6 MLJ 222 at p 233; [2008] 6 CLJ 773 was made and to p 784 (CLJ) as follows:

> [12] ...The defence quite properly took advantage of this fact to demonstrate that Woo was the real trafficker and that the accused was entirely innocent. The accused was clearly entitled to do this in view of the decision in *Mohamad Radhi v Public Prosecutor* [1991] 3 MLJ 169; [1991] 3 CLJ 2073; [1991] 1 CLJ Rep 311 (SC). That case is authority for the proposition that a person charged with trafficking is entitled to an acquittal on that charge by showing that he was a mere possessor of the drugs whilst another was the true trafficker. Whenever such a defence is taken two separate exercises must be carried out by the trial judge. He must first determine as a fact whether that either is a real person or a mere figment of the accused's imagination invented for the purpose of the trial. Next, if he finds that other person to be real the judge must then determine whether that other person is the real trafficker. This is called the *Radhi* direction and must be administered by a court unto itself when such a defence is taken. See *Sachima Okoye v Public Prosecutor* [1995] 1 MLJ 538; [1995] 3 CLJ 371 (CA).

[25] We have no issue with the proposition that the HCJ has to determine whether that person who is supposed to be the true trafficker is a real person or

not. This was indeed determined by the HCJ who ultimately found that the accused knowing Yaya was 'hanya satu rekaan cerita dongeng sahaja' (para 51) and that Yaya was 'hanya satu rekaan tertuduh sahaja' (para 53). The HCJ simply did not believe that Yaya existed. We find that the HCJ buttressed his finding in paras 51 and 52 as follows:

> [51] Mahkamah ini sukar untuk mempercayai akan kewujudan Yaya yang semasa SP2 diperiksa balas, peguambela ada mempersoalkan bahasa yang digunakan oleh SP2 ketika berkomunikasi dengan tertuduh yang menurut SP2 dalam Bahasa Inggeris yang mudah. Tetapi diletakkan kepada SP2 kenapa SP2 tidak menggunakan seorang jurubahasa Cina dalam berkomunikasi dengan tertuduh. Jelas daripada ini menunjukkan tertuduh tidak memahami Bahasa Inggeris. Semasa memberi keterangan mahkamah tidak dapat melihatkan tertuduh memahami Bahasa Inggeris mahupun yang mudah. Oleh itu adalah tidak munasabah langsung tertuduh mengenali Yaya melalui media bahasa dengan menggunakan Bahasa Cina. Tentunya Yaya yang warganegara Nigeria akan menggunakan Bahasa Inggeris dalam komunikasinya dalam media bahasa tersebut mahkamah ini amat meragui bagaimana tertuduh boleh mengenali Yaya. la hanya satu rekaan cerita dongeng tertuduh sahaja:
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> > S: Dan kau juga setuju dengan saya apa yang kau cakap dalam Bahasa Inggeris itu dia pun tak faham, betul tak seperti ayam bercakap dengan itik.
> >
> > J: Betul.
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> [52] Perwatakan individu yang bernama Yaya yang dikenali melalui laman sosial. Walau bagaimanapun tertuduh pernah beberapa kali berjumpa dan tempoh perkenalannya selama tiga bulan dan Yaya berjanji untuk berkahwin dengan tertuduh. Tertuduh menganggap Yaya adalah teman lelakinya. Adalah mustahil dalam keadaan sebegini tertuduh tidak mengetahui butir-butir lengkap Yaya. Tertuduh dalam keterangannya dan dalam percakapan beramarannya tertuduh tidak dan gagal menyatakan butir lanjut berkenaan penama Yaya tersebut Yaya merupakan orang yang memberi pekerjaan kepada tertuduh dan menanggung segala perbelanjaan membawa sampel-sampel baju dan kasut keluar negeri tentunya sebagai seorang yang munasabah akan mendapatkan butir-butir Yaya tidak hanya sekadar nama Yaya sahaja. Lebih-lebih lagi perkenalan yang tertuduh hanya melalui laman sosial tentunya lebih kewajaran dalam hal keadaan sebegini mengkehendaki tertuduh mendapatkan butir lengkap Yaya, bagi mengelakkan tertuduh dipergunakan atau ditipu. Kegagalan memberi butir-butir ini bukan sahaja menjurus kepada ketidak munasabahan penceritaan tertuduh malah mengecewakan pihak polis untuk menyiasat dalam mempastikan kewujudan Yaya tersebut maklumat mengenai Yaya ini tidak memenuhi kehendak sebagai satu notis kepada pihak pendakwaan mengikut kes *Alcontara a/l Ambros Anthony v Public Prosecutor* [1996] 1 MLJ 209. Kewujudan Yaya tidak pernah dibuktikan oleh perayu (*Luo Wenqin v Pendakwa Raya* [2019] MLJU 294; [2019] 1 LNS 517; *Ismayilova Namid Qizi Irada v Public Prosecutor* [2016] MLJU 1565; [2016] 1 LNS 20; *Tobeichi Chinonso Madu v Public Prosecutor*; *Ali Hosseinzaldeh Bashir v Public Prosecutor.*

[26] Such reasoning as set out above are cogent and we find no grounds to depart from them, The HCJ had reasoned that the accused had met Yaya through social media. If indeed the accused had met Yaya several times and they were to be married, then it was not possible for her not to have any details on Yaya. What the accused had was only the name of Yaya. This was coupled with Yaya having borne all the expenses for her trip to Malaysia. This is borne out by the questions and answers in her cautioned statement (encl 13/66) as follows:

S: Adakah pakaian yang terkandung dalam beg bagasi warna coklat tersebut milik kamu?

J: Ada beberapa pakaian milik saya yang lain adalah milik rakan saya nama Yaya.

S: Milik siapa beg basai warna coklat jenama Dashentu bertag No 0807174826 No Flight AK 131 atas Nama Wei/HongPing yang kamu bawa?

J: Milik seorang rakan saya bernama Yaya. Beg tersebut adalah untuk dikirim kepada seseorang di Malaysia yang saya sendiri tidak tahu kerana Yaya hanya beritahu saya ia hanyalah sampel pakaian dan kasut

S: Siapa Yaya?

J: Seorang lelaki Nigeria yang saya kenali sejak dari tahun 2013 melalui Laman Sosial.

S: Bagaimana kamu kenali Yaya?

J: Dia merupakan kenalan saya melalui Laman sosial, dan saya hanya berjumpa dengannya selepas 3 bulan mengenalinya.

S: Berapa kali kamu pernah berjumpa dengan Yaya?

J: Saya hanya berjumpa beberapa kali dengannya sahaja selama kami berkenalan.

S: Bagaimana kamu berhubung dengan Yaya?

J: Biasanya melalui panggilan telefon Yaya.

S: Boleh kamu ceritakan bagaimana ciri-ciri Yaya yang kami maksudkan?

J: Seorang lelaki kulit hitam, tinggi dan warga Nigeria.

S: Apa nombor telefon Yaya untuk berhubung dengan kamu?

J: Saya tidak ingat kerana Yaya selalu tukar-tukar nombor telefon untuk menghubungi saya.

[27] From the above, it can also be seen that the information on Yaya, or rather the lack of it, not only went to the reasonableness of the accused narration of Yaya but it was also not sufficient for the police to investigate and determine the existence of Yaya. This was not an *Alcontara* notice. The HCJ had correctly referred to an earlier decision of this court in *Tobechi Chinonso Madu v Public Prosecutor* [2015] MLJU 2038 as follows:

[16] The mere fact that Ossy's name was mentioned during the police investigation

A is not evidence that Ossy actually exists. How were the police to investigate the existence of this person when the appellant did not even give his full name and his residential address? The poor investigating officer may end up chasing a wild goose. We therefore found no merit in the appellant's argument that the police's failure to investigate the existence of Ossy must be held against the prosecution.

B

[28] By the same token, the police cannot be faulted for not having investigated Yaya given the paucity of information.

C **[29]** It was further contended that the HCJ had misdirected himself and made a conjecture that Yaya would use English as a mode of communication. Such a contention is misplaced as evident from the evidence of the accused referred to above and which is repeated here:

D S: Dan kau juga setuju dengan saya apa yang kau cakap dalam Bahasa Inggeris itu dia pun tak faham, betul tak seperti ayam bercakap dengan itik.

J: Betul.

[30] The next contention was that all the details or information on Yaya such E as the conversations between the accused with him on WeChat, his handphone number and photographs of them, were in the Samsung handphone. The handphone was not produced in court and had gone missing after its seizure. It had also been not sent for forensic examination. PW4 (the Investigating Officer) had not investigated the handphone numbers in the Samsung as it F only contained foreign numbers. The onus was on the prosecution to check the existence of Yaya and all these meant the accused had lost a chance to be acquitted.

[31] The above contention had been considered by the HCJ when it was said G that there really was nothing much for the prosecution to investigate on the Samsung when there were no details on Yaya (para 24). This has to be read together with para 25 where the evidence showed the accused to have possession of the bag where the drugs were found and PW4's evidence that there was no foreign DNA on the clothes seized. Although the defence H contended what PW4 said was 'saya silap bila cakap tiada DNA asing tapi ada DNA OKT' (Vol 2(1)/67), the fact remained the DNA of the accused was found on the clothes seized.

[32] The HCJ had also noted that the information on Yaya was not I sufficient for the police to investigate and determine the existence of Yaya.

[33] We agree with the HCJ that the defence of innocent carrier has also to be examined in the light of the doctrine of willful blindness. In *Maria Elvira Pinto Exposto v Public Prosecutor* [2020] 3 MLJ 21; [2020] 5 CLJ 1 this was said

at p 35 (MLJ); p 17 (CLJ):

> [41] The law only requires the accused to inspect or enquire when reasonable cause for obvious suspicion arises, and if the accused takes no step or effort to dispel this lingering suspicion then he or she is presumed to have known and accepted the risk of that suspicious endeavor. The facts of this case do not warrant the application of the doctrine of willful blindness to the appellant. The appellant could not be said to have shut her eyes to the obvious when there was nothing or even remotely suspicious to begin with.

[34] At para 48 of our instant case, the HCJ said this:

> [48] Doctrine 'willful blindness' (*kebutaan yang disengajakan*) boleh dirumuskan sebagai terpakai kepada situasi dimana hal keadaan yang menimbulkan kecurigaan yang cukup kepada seorang yang munasabah untuk membuat pertanyaan (*inquiry*) akan kesalahan sesuatu transaksi tertentu. Dengan kata lain sekiranya keadaan itu ada menimbulkan syak wasangka adalah menjadi kewajipan tertuduh untuk membuat pertanyaan yang perlu bagi memuaskan hatinya ketulinan atau kebenaran tentang apa yang dimaklumkan kepadanya. Sekiranya ia gagal berbuat demikian maka tertuduh bersalah atas kebutaan yang disengajakan (*Public Prosecutor v Halina Purnama Sari*). Seterusnya kegagalan itu merupakan perbuatan yang disengajakan kerana tidak membuat pertanyaan.

[35] The facts as found by the HCJ in para 49 showed that the accused had failed to make the necessary inquiries and instead turned a blind eye to what was obvious. This was how it was analysed by the HCJ:

> [49] Dalam kes ini tertuduh baru sahaja mengenali Yaya. Kebanyakkan perhubungan melalui sosial dan telefon dan beg tersebut diserahkan kepada tertuduh melalui seorang lelaki Nigeria yang tidak dikenalinya. Malah Yaya juga tidak diketahui akan butir-butir lengkapnya oleh tertuduh. Beg yang hendak dihantar kepada seseorang di Malaysia. Barang yang hendak dihantar hanya merupakan sampei beberapa pakaian dan kasut yang murah tetapi dengan upah yang begitu lumayan diberi oleh Yaya serta kos-kos lain ditanggung oleh Yaya. Beg tersebut berada dalam kawalan dan jagaan tertuduh sepanjang pagi dan petang 1 November 2014. Penyerahan beg dengan sampei pakaian dan kasut kepada kawan Yaya yang tidak diketahui nama, butir-butir lain serta alamat yang dihantar kesemua perkara ini sewajarnya memberi syak kepada tertuduh, jika benar beg tersebut diserahkan oleh Yaya kepada tertuduh, untuk tertuduh membuat pertanyaan akan kandungan dan perkara sebenar disebalik penghantaran kasut dan pakaian tersebut tetapi tertuduh gagal berbuat demikian dengan sengaja membutakan matanya pada perkara-perkara yang jelas.

[36] The turning of a blind eye was in relation to the delivery of the bag which consisted of inexpensive samples of clothes and shoes, but the accused was to be paid a lucrative sum. Such delivery was to a friend of Yaya whose name, address and other details are unknown. In relation to Yaya, this has been considered when dealing with whether he existed and that there was no

information on him, other than his name.

[37] The HCJ had also stated in para 40 that innocent carrier refers to a situation where the accused admits to carrying the bag containing the drugs but denies having knowledge that the drugs are in the bag. This was next said in para 42 as follows:

> [42] Mahkamah ini mendapati tidak mungkin tertuduh tidak mengetahui akan dadah-dadah berbahaya di dalam beg tersebut (P12) tersebut. Penceritaan tertuduh tidak munasabah mengenai:
>
> (a) Yaya memberi upah Renminbi 4,000 dan menanggung segala perbelanjaan yang banyak, membuat visa, tiket penerbangan dan penginapan tertuduh semata-mata untuk membawa sample baju dan kasut yang tertuduh sendiri akui merupakan barang-barang yang murah. Adalah lebih munasabah sampei pakaian dan kasut jika ia tujuannya untuk dijual adalah lebih murah dan patut diperkenalkan melalui media sosial yang kebanyakkan ditakukan oleh mereka-mereka yang berniaga secara 'online';
>
> (b) Tidak mungkin penceritaan tertuduh bahawa kawan Yaya seorang lelaki Nigeria menyerahkan beg tersebut kepada tertuduh tanpa penjelasan bagaimana lelaki Nigeria itu mengenali dan mengetahui tempat tinggal tertuduh. Baik keterangan tertuduh mahupun dalam percakapan beramaran tidak menjelaskan keadaan ini. Pada hemat mahkamah perwatakan lelaki Nigeria ini segaja diwujudkan bagi menunjukkan bahawa tertuduh tidak mempunyai kesempatan untuk bertanya dengan Yaya;
>
> (c) Penceritaan tertuduh beg kitar semula yang dibawa bersama yang akan digunakan untuk membawa pakaiannya balik ke negeri China selepas barang itu diserahkan kepada seseorang, telah tidak pernah ditimbulkan semasa saksi SP2 memberi keterangan dan tidak pernah dijumpai dalam beg bagasi semasa SP2 memberi keterangan menunjukkan tertuduh cuba mereka-reka cerita, serta menunjukkan beliau sudah mengetahui kandungan beg tersebut;
>
> (d) Ketiadaan butir-butir penerima barang turut menimbulkan keraguan dan kesangsian akan cerita tertuduh mengenai pengetahuannya, tertuduh sendiri mengaku tidak tahu siapa penerima beg di Malaysia. Adalah mustahil tujuan tertuduh seperti yang diceritakan bagi menyerahkan sample-sample pakaian dan kasut kepada kawan Yaya yang tertuduh sendiri tidak mengetahuinya, kecuali fakta itu menunjukkan bahawa tertuduh mengetahui wujudnya dada di dalam beg bagasi itu untuk diedarkan kepada pihak ketiga yang diketahui sendiri oleh tertuduh; dan
>
> (e) Tertuduh mengemukakan pembelaan bahawa dadah dijumpai tersembunyi di dalam beg dan beliau tidak boteh mengetahui kewujudan dadah tersebut. Alasan ini tidak boleh diterima, sekiranya ia diterima pengedar dadah berbahaya boleh mengedar dadah berbahaya dengan cara menyembunyikan dadah tersebut di dalam beg yang dibawa mereka dan

terlepas dari tindakan pihak berkuasa dan pendakwaan atas alasan dadah berbahaya tersebut tersembunyi dan tidak dapat dilihat dengan mata kasar mahkamah merujuk apa yang dikatakan oleh Abdul Rahman Sebli Hakim Mahkamah Rayuan dalam kes *Ali Hosseinzadeh Bashir v Public Prosecutor.*

[38] We again find no reason to depart from the finding of the HCJ. The most telling is that the clothes and shoes to be brought over to Malaysia were, as even admitted by the accused, not expensive and it was more reasonable these samples be introduced online. Instead, Yaya had to bear all costs incurred such as payment of RMB4,000 to the accused, the flight ticket, visa fee and accommodation, just so that the samples be brought over physically.

[39] Reference was also made to the drugs being hidden in the bag such that the accused could not have known of the drugs. This was put paid by the HCJ that if that were so, liability would be escaped by merely ensuring that the drugs are hidden. This was indeed the principle stated in *Ali Hosseinzadeh* cited by the HCJ. There, the court expressed surprise that the contention that since the drugs were hidden from view, the appellant there could not have known of their presence. It referred to the Singapore Court of Appeal case in *Zulfikar bin Mustaffah v Public Prosecutor* [2001] 1 SLR 633 that 'while the content of the bundles were hidden from view may have been relevant in determining whether the requisite knowledge was absent, this factor should not be given too much weight. Otherwise, drug peddlers could escape liability ... Rather the court must appraise the entire facts of the case to see if the accused's claim to ignorance is credible'. As duly noted by the HCJ, the fact of the matter is that it all depends on the facts and circumstances of the case.

[40] We therefore find that the HCJ did not err in finding that Yaya was a fictitious person. The HCJ had also considered all aspects of the defence of innocent carrier, willful blindness and whether it could be said the accused had no knowledge of the drugs in the bag. We find that the conviction is safe and we dismiss the appeal on conviction.

SENTENCE

[41] We would however set aside the death sentence and substitute it with life imprisonment.

[42] Section 39B(2A) of the DDA provides as follows:

(2A) In exercising the power conferred by subsection (2), the Court in imposing the sentence of imprisonment for life and whipping of not less than fifteen strokes, may have regard only to the following circumstances:

A

(a) there was no evidence of buying and selling of a dangerous drug at the time when the person convicted was arrested;

(b) there was no involvement of agent provocateur; or

(c) the involvement of the person convicted is restricted to transporting, carrying, sending or delivering a dangerous drug; and

B

(d) that the person convicted has assisted an enforcement agency in disrupting drug trafficking activities within or outside Malaysia.

C

[43] With this provision, the mandatory death sentence is no longer the only sentence available to the court. The court has a discretion to impose a sentence of life imprisonment. This is on the high authority of the Federal Court in *Taja bin Tarji & Herman v Public Prosecutor* (05[M]-98–09 of 2020(J)) (unreported) where there can be an exercise of discretion in the light of s 39B(2A) of the DDA.

D

[44] Here, the HCJ, without more, only stated that the accused's case did not fall under s 39B(2A). In the circumstances of the case, we exercised our discretion given under s 39B(2A) of the DDA.

E

CONCLUSION

[45] For the above reasons, we affirmed the conviction and substituted the death sentence with that of life imprisonment.

F

Conviction affirmed and sentence substituted with life imprisonment.

Reported by Nabilah Syahida Abdullah Salleh

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